Supreme Court, U.S.
FILED

112

(1) 08-698 NOV 19 2008

NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Gregory A. Howell and PFS Distribution Company,

Petitioners,

v.

Mary E. Fulmore, Administrator of the Estate of Priscilla Ann Maultsby, and Ina Loftin Harper,

Respondents.

On Petition for Writ of Certiorari
To the Court of Appeals of North Carolina

PETITION FOR WRIT OF CERTIORARI

Charles F. Hilton, Esquire*
Thomas E. Ullrich, Esquire
Wharton, Aldhizer & Weaver, P.L.C.
100 South Mason Street
Harrisonburg, Virginia 22801
(540) 438-5301

Counsel for Petitioners
**Counsel of Record*

QUESTION PRESENTED FOR REVIEW

Does Section 7(a)(1) of the Federal Privacy Act of 1974 limit the authority of a trial court to require an individual to disclose his or her Social Security number to an adverse party in civil litigation?

PARTIES TO THE PROCEEDING

Petitioners are Gregory A. Howell, a truck driver employed by Co-Petitioner PFS Distribution Company at the time of the motor vehicle collision that gives rise to the underlying action. Petitioners are represented by Charles F. Hilton (counsel of record) and Thomas E. Ullrich of Wharton, Aldhizer & Weaver, P.L.C., 100 South Mason Street, Post Office Box 20028, Harrisonburg, Virginia, 22801-7528. PFS Distribution Company is a Delaware Corporation authorized to do business in the State of North Carolina.

Respondents are Mary E. Fulmore, Personal Administrator of the Estate of Priscilla Ann Maultsby, deceased, and Ina Loftin Harper. Fulmore is the Plaintiff in the underlying action. Fulmore is represented by Shean Williams, Esquire, and Hezekiah Sistrunk, Jr., Esquire, of Cochran, Cherry, Givens, Smith & Sistrunk P.C., 127 Peachtree Street, N.W., Suite 800, Atlanta, Georgia, 30303; and Joretta Durant, Esquire, of Joretta Durant, P.C., Post Office Box 2369, Kinston, North Carolina, 28502-2369. Ina Loftin Harper is a third-party Defendant in the underlying action represented by Stuart L. Stroud, Esquire, of Wallace, Morris, Barwick, Landis & Stroud, Post Office Box 3557, Kinston, North Carolina, 28502-3557.

Insofar as the constitutionality of North Carolina General Statute section 132-1.10 may be

in question under the doctrine of preemption, 28 U.S.C. § 2403(b) may apply and three copies of this Petition have been served on the Attorney General of the State of North Carolina.

CORPORATE DISCLOSURE STATEMENT

PFS Distribution Company is a privately held corporation. Its parent corporation, Pilgrim's Pride Corporation, owns 100% of the stock of PFS Distribution Company. Pilgrim's Pride Corporation is a publicly traded corporation and no other corporation owns more than ten percent (10%) of its stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF CITED AUTHORITIES vii

CITATIONS OF LOWER OPINIONS AND ORDERS 1

STATEMENT OF JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 6

A. Procedural Background 6

B. Factual Background 8

C. Preservation of Issue 9

ARGUMENT FOR GRANTING WRIT OF CERTIORARI 10

A. Introduction 12

B. No decision of this Court explicates the scope of Section 7(a)(1) of the Privacy Act .. 20

C. This Court should decide whether the "court ordered disclosure" exception for governmental disclosures of records in section 3 of the Act, 5 U.S.C. § 552a(b)(11), applies to an individual as an exception to Section 7(a)(1) or if the exceptions to

disclosures embodied in Section 7(a)(2) are exclusive to Section 7 21

D. This Court should decide whether Section 7(a)(1) of the Act preempts state statutes that would otherwise permit a state court to order an individual to disclose his or her Social Security number directly to an adverse party 27

E. The prohibition in Section 7(a)(1) of the Privacy Act against governmental denial of any right, benefit or privilege for an individual's refusal to disclose his or her Social Security number implicates the scope of the informational privacy doctrine over which the state courts and the United States Circuit Courts of Appeal are split.... 31

CONCLUSION 36

APPENDICES .....

Appendix A

Order of Trial Court dated April 5, 2008

Appendix B

Order of Trial Court dated April 5, 2008

Appendix C

Fulmore v. Howell, 657 S.E.2d 437 (N.C. Ct. App. 2008)

Appendix D

Order of North Carolina Supreme Court dated August 26, 2008

Appendix E

Pages 87 – 92 of Trial Court Motions
Hearing Transcript dated March 14, 2007

TABLE OF CITED AUTHORITIES

Cases

American Federation of Govt. Employees v. Dept. of Housing and Urban Dev't, 118 F.3d 786, (D.C. Cir. 1997) 33

Arakawa v. Sakata, 133 F. Supp. 2d 1223 (D. Haw. 2001) 15, 34

Arnold v. Am. Nat'l Red Cross, 639 N.E.2d 484 (Ohio Ct. App. 1994) 29

Brookens v. United States, 627 F.2d 494 (D.C. Cir. 1980) 22

Burnett v. County of Bergen, 954 A.2d 483 (N.J. Super. Ct. App. Div. 2008) 35

Busse v. Motorola, Inc., 813 N.E.2d 1013 (Ill. App. Ct. 2004) 29

Cartwright v. Midtown Hosp., 534 S.E.2d 504 (Ga. Ct. App. 2000) 29

Chambers v. Klein, 419 F. Supp. 569 (D.N.J. 1976) 22

Claugus v. Roosevelt Island Hous. Mgmt. Corp., No. 96CIV8155, 1999 WL 258275 (S.D.N.Y. Apr. 29, 1999) 22

Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) 2

Dittman v. California, 191 F.3d 1020 (9th Cir. 1999) 13

Doe v. Attorney General, 941 F.2d 780 (9th Cir. 1991) 33

Doe v. Chao, 540 U.S. 614 (2004) 13, 20

Doe v. New York, 15 F.3d 264 (2d Cir. 1994) 33

Eagle v. Morgan, 88 F.3d 620 (8th Cir. 1996) 33

English v. Gen. Elec. Co., 496 U.S. 72 (1990) 30

Fidelity Sav. & Loan Assoc. v. de la Cuesta, 458 U.S. 141 (1982) 30

Fink v. Moreno, Becerra & Guerrero, Inc., No. B196118, 2008 WL 2154074 (Cal. Ct. App. May 23, 2008) 28-29

Florida Lime and Avacado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 30

Fulmore v. Howell, 657 S.E.2d 437 (N.C. Ct. App. 2008) 1, 8

In re Crawford, 194 F.3d 954 (9th Cir. 1999) 32-33, 34

James v. Douglas, 941 F.2d 1539 (11th Cir. 1991) 33

Jones v. Rath Packing Co., 430 U.S. 519 (1977) ... 29

Kallstrom v. Columbus, 136 F.3d 1055 (6th Cir. 1998) 33

Kasler v. Howard, 323 F. Supp. 2d 675 (W.D.N.C. 2003) 22

Lambert v. Hartman, 517 F.3d 433 (6th Cir. 2008) 35, 36

Lord v. Bd. of Chiropractic Exam's, 739 So. 2d 273 (La. Ct. App. 1999) 22

Meyerson v. Prime Realty Servs., LLC, 796 N.Y.S.2d 848 (N.Y. Sup. Ct. 2005) 16, 29

Montana v. Walter, No. 01-356, 43 F.3d 983, 2001 WL 1636930 (Mont. Dec. 21, 2001) 22

NBA Properties, Inc. v. Untertainment Records LLC, No. 99 CIV. 2933, 1999 WL 1103006 (S.D.N.Y. Dec. 6, 1999) 28

Nelson v. Nat'l Aeronautics and Space Admin., 530 F.3d 865 (9th Cir. 2008) 35

Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) 32

Pacific Gas and Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n, 461 U.S. 190 (1983) 30

Reno v. Condon, 528 U.S. 141 (2000) 14, 15

Russell v. Board of Plumbing Examiners of County of Westchester, 74 F. Supp. 2d 339 (S.D.N.Y. 1999) 13

Sherman v. United States Dep't of the Army, 244 F.3d 357 (5th Cir. 2001) 14, 35

Southland Corp. v. Keating, 465 U.S. 1 (1984) 2

State ex rel. Beacon Journal Publ'g Co. v. City of Akron, 640 N.E.2d 164 (Ohio 1994) 14, 34

Thomas v. Smith, 882 So. 2d 1037 (Fla. Dist. Ct. App. 2004) 35

United States Dep't. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989) 20, 34

United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439 (1993) 2

United States v. Welden, 377 U.S. 95 (1964) 2

United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980) 33

Whalen v. Roe, 429 U.S. 589 (1977) 32

Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) 29

Wolman v. United States Selective Serv. Sys., 501 F. Supp. 310 (D.D.C. 1980) 22

Wolman v. United States, 542 F. Supp. 84 (D.D.C. 1982) 22

Woods v. White, 689 F. Supp. 874 (W.D. Wis. 1988) 33-34

Statutes

5 U.S.C. § 552(b)(7)(C) 14

5 U.S.C. § 552(e) 25

5 U.S.C. § 552(f)(1) 4, 25

5 U.S.C. § 552a 2

5 U.S.C. § 552a(a)(1) 24, 25

5 U.S.C. § 552a(a)(2) 24

5 U.S.C. § 552a(a)(5) 26

5 U.S.C. § 552a(b) 23, 24, 25

5 U.S.C. § 552a(b)(11) ..... *passim*

5 U.S.C. § 552a(g)(4) 20

5 U.S.C. § 552a(7)(a)(b)(7) 13
28 U.S.C. § 1257 2
42 U.S.C. § 405(c)(2)(B) 12
42 U.S.C. § 405(c)(2)(C)(i) 23
42 U.S.C. § 405(c)(2)(C)(ii) 23
42 U.S.C. § 405(c)(2)(C)(iv) 23
42 U.S.C. § 405(c)(2)(C)(viii)(I) 12
42 U.S.C. § 405(c)(2)(C)(ix) 23
42 U.S.C. § 405(c)(2)(D)(i)(I) 23
42 U.S.C. § 405(c)(2)(E)(i)(II) 23
Alaska Stat. § 47.12.170 (West, Westlaw through Oct. 2008 amendments) 28
Anti-drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802(b), 100 Stat. 3207 (1986) 25
Cal. Gov't. Code § 68107 (West, Westlaw through Ch. 763 of 2008 Reg. Sess. and Ch. 7 of 2007-2008 Third Ex. Sess.) 27-28
Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, 95 Stat. 1099 (1981) 22
Driver's Privacy Protection Act of 1994 (18 U.S.C. §§ 2721-2725 14
N.C. Gen. St. § 7A-31 8
N.C. Gen. St. § 132-1.10 ..... 4-5, 27, 30
N.C. Gen. St. § 132-1.10 (c)(2) 27
Or. Rev. Stat. § 18.042 (West, Westlaw through 2008 Special Sess.) 28

Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896, 1909 (1974) ..... *passim*

Va. Code Ann. § 19.2-305.1 (West, Westlaw through 2008 Special Sess. II) 28

Rules

Fed. R. Civ. P. 5.2(a) 28

Fed. R. Civ. P. 26(b)(1) 31

L.R., D. Mass. 67.3 28

N.C. R. Civ. P. 26 31

N.C. R. Civ. P. 33 7

N.C. R. Civ. P. 34 7

N.C. R. Civ. P. 41(a) 6

Sup. Ct. R. 13.1 2

Treatises

A. Michael Froomkin, The Death of Privacy?, 52 Stan. L. Rev. 1461 (2000) 15

Clifford S. Fishman, Technology and the Internet: The Impending Destruction of Privacy by Betrayers, Grudgers, Snoops, Spammers, Corporations, and the Media, 72 Geo. Wash. L. Rev. 1503 (2004) 15

Elbert Lin, Prioritizing Privacy: A Constitutional Response to the Internet, 17 Berkeley Tech. L.J. 1085 (2002) 15

Flavio L. Komuves, We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers, 16 J. Marshall J. Computer & Info. L. 529 (1998) 15, 19

Other Authorities

1974 U.S.C.C.A.N. 6916, 6945 17

Barbara D. Bourbjerg, U.S. Gen. Accounting Office, Social Security Numbers: Ensuring the Integrity of the SSN GAO-03-941T (2003) 18

Social Security Numbers: Federal Actions Could Further Decrease Availability in Public Records, Though Other Vulnerabilities Remain GAO-07-752 (2007) 19

Synovate, Federal Trade Commission-2006 Identity Theft Survey Report (2007) 18-19

CITATIONS OF LOWER OPINIONS AND ORDERS

This is a civil action originating in the Superior Court of Wayne County, North Carolina ("Superior Court" or "trial court".) On April 5, 2007, the Superior Court entered two orders requiring Howell to provide Fulmore with his Social Security number through answers to interrogatories and deposition questioning. Reproductions of both orders are included at Appendices A and B. Because these interlocutory orders affect substantial privacy interests, Petitioners appealed the trial court's ruling to the Court of Appeals of North Carolina. The Court of Appeals affirmed the Superior Court and the Court of Appeals' decision is reported as Fulmore v. Howell, 657 S.E.2d 437 (N.C. Ct. App. 2008), reproduced at Appendix C. Howell and PFS Distribution Company petitioned the North Carolina Supreme Court for discretionary review of the Court of Appeals' decision, which was denied on August 26, 2008, without opinion. The North Carolina Supreme Court's Order of August 26, 2008, is reproduced as Appendix D.

STATEMENT OF JURISDICTION

Petitioners seek review of the judgment of the Court of Appeals of North Carolina. That judgment was subject to discretionary review by the Supreme Court of North Carolina, North Carolina's court of last resort. The order of the North Carolina Supreme Court denying

discretionary review was entered August 26, 2008. Therefore, this Petition is timely pursuant to United States Supreme Court Rule 13.1.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257. Because this appeal presents questions of important federal rights that will be lost or significantly eroded without this Court's immediate review, the posture of this case satisfies the jurisdictional requirements for finality to vest this Court with jurisdiction to review the state court's decision. See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 482-83 (1975); Southland Corp. v. Keating, 465 U.S. 1, 6 (1984).

STATUTORY PROVISIONS INVOLVED

Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896, 1909 (1974)[1]:

Sec. 7(A)(1). It shall be unlawful for any federal, state or local government agency to deny any individual any right, benefit, or privilege provided by law because of such individual's

---

[1] Whereas other provisions of the Privacy Act are codified in the United State Code, Section 7 is not codified. Section 7 can be found either in the Statutes at Large, P.L. 93-579, or the "Historical and Statutory Notes" following 5 U.S.C. § 552a. See 5 U.S.C. § 552a (note). Section 7 is, nevertheless, controlling authority. United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 448 (1993); United States v. Welden, 377 U.S. 95, 98 (1964) (Statutes at Large prevail over inconsistencies with United States Code).

refusal to disclose his Social Security account number.

(2) The provisions of paragraph (1) of this subsection shall not apply with respect to –

(a) any disclosure which is required by federal statute, or

(b) the disclosure of a Social Security number to any federal, state or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulations adopted prior to such date to verify the identity of an individual.

(B) Any federal, state, or local government agency which requests an individual to disclose his Social Security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

Records maintained on individuals, 5 U.S.C. § 552a(b)(11):

* * *

(b) Conditions of disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a

written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be –

* * *

(11) pursuant to the order of a court of competent jurisdiction ...

Definitions, 5 U.S.C. § 552(f)(1):

(f) For purposes of this section, the term—
(1) "agency" as defined in section 551 (1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency; and

North Carolina General Statute § 132-1.10. Social security numbers and other personal identifying information:

* * *

(b) Except as provided in subsections (c) and (d) of this section, no agency of the State or its political subdivisions, or any agent or employee of a government agency, shall do any of the following:

(1) Collect a social security number from an individual unless

authorized by law to do so or unless the collection of the social security number is otherwise imperative for the performance of that agency's duties and responsibilities as prescribed by law. Social security numbers collected by an agency must be relevant to the purpose for which collected and shall not be collected until and unless the need for social security numbers has been clearly documented.

* * *

(5) Intentionally communicate or otherwise make available to the general public a person's social security number or other identifying information . . . .

* * *

(c) Subsection (b) of this section does not apply in the following circumstances:

(2) To social security numbers or other identifying information disclosed pursuant to a court order, warrant, or subpoena.

STATEMENT OF THE CASE

A

Procedural Background

Mary E. Fulmore, Administrator of the Estate of Priscilla Ann Maultsby, deceased, filed a Complaint for wrongful death in the Superior Court of Wayne County, North Carolina, on January 6, 2006, against Gregory A. Howell, and Pilgrim's Pride Corporation of North Carolina, Inc., ("Pilgrim's Pride"). Fulmore alleged that Howell operated his tractor-trailer negligently on August 5, 2004, when it collided with a sports utility vehicle driven by Maultsby, resulting in her death. Fulmore also alleged that Pilgrim's Pride was liable for Mr. Howell's actions under the doctrine of *respondeat superior,* and for negligently entrusting its tractor-trailer to Howell. Pilgrim's Pride and Howell answered the Complaint and filed a Third-Party Complaint against Ina Loftin Harper, another motorist involved in the collision.

Pursuant to a consent order allowing joinder of PFS Distribution Company ("PFS"), a wholly owned subsidiary of Pilgrim's Pride, and amendment of the Complaint, Fulmore filed a Second Amended Complaint adding PFS as a Defendant. Fulmore voluntarily dismissed Pilgrim's Pride pursuant to Rule 41(a) of North Carolina Rules of Civil Procedure.

Fulmore propounded interrogatories and requests for production of documents to Howell and PFS pursuant to Rules 33 and 34 of the North Carolina Rules of Civil Procedure. Counsel for Howell and PFS objected to the interrogatories and request for production of documents that demanded disclosure of Howell's Social Security number on the basis that such disclosure violated Howell's privacy interests. Fulmore also took Mr. Howell's deposition during which, based on the Federal Privacy Act of 1974, Howell refused to disclose his Social Security number. As a result, Fulmore moved the Superior Court to compel Howell and PFS to disclose Howell's Social Security number.

On March 14, 2007, the parties appeared in the Superior Court on Fulmore's motions to compel. Fulmore argued that Howell's Social Security number should be produced so she can investigate, through unidentified third-party sources, Howell's driving, professional and criminal history; determine if Howell uses any aliases; and see if Howell has multiple drivers' licenses. (Appendix E3-E5). To do so, Fulmore intends to feed Howell's Social Security number into undisclosed internet "databases to try to find out if there are [sic] any additional criminal driving or professional history that might not be connected to the drivers license information." (Appendix E-4). Fulmore expressly plans to use Howell's Social Security number to gather information from an unspecified electronic search

engine extending beyond motor vehicle records. (Appendix E-5).

After hearing arguments of counsel, the trial court granted Fulmore's motions on the argument that disclosure of Howell's Social Security number may lead to the discovery of admissible evidence. Two orders reflecting the trial court's rulings were entered on April 5, 2007, Appendices A and B. PFS and Howell appealed the orders to the North Carolina Court of Appeals which issued its opinion on March 4, 2008, affirming the orders of the trial court. Fulmore v. Howell, 657 S.E.2d 437 (N.C. Ct. App. 2008), Appendix C.

On April 4, 2008, Howell and PFS petitioned the North Carolina Supreme Court for discretionary review pursuant to North Carolina General Statute section 7A-31. The North Carolina Supreme Court denied review by order dated August 26, 2008, Appendix D.

B

Factual Background

This action is based on a three-vehicle collision on rural Highway 55 in Wayne County, North Carolina, on the night of August 5, 2004. That night, Gregory A. Howell was driving a tractor-trailer operated by PFS. He was traveling in a westerly direction hauling a load of processed turkeys and, as he approached a slight leftward

curve, he saw a car driven by Ina Harper coming toward him from the opposite direction. At first, due to the curve of the road, he could not tell which lane she was in but he quickly perceived that she was in the wrong lane—in his lane of travel. He maneuvered to the right to drive off the shoulder of the road but realized that Harper was headed off the road toward the same point. To avoid a head-on collision with Harper, he veered back to the left hoping to stay in his lane and avoid Harper. Despite his efforts, Harper struck the truck head-on, breaking the truck's front axle. The truck's momentum carried it into the opposite lane, directly into the path of Maultsby's sport utility vehicle. Maultsby was killed instantly in the resulting crash.

C

Preservation of Issue

The issue of Mr. Howell's privacy interests and the extent that his Social Security number is protected from discovery were properly and timely raised below. Counsel for Petitioners objected to the interrogatory and requests for production of documents that asked for Howell's Social Security number on the basis of Mr. Howell's privacy interests in his Social Security number. The protection of Howell's Social Security number under Section 7 of the Privacy Act of 1974, P.L. 93-579, 88 Stat. 1896, (the "Privacy Act" or the "Act") was raised before the Superior Court, (Appendix E6-E7), and in both subsequent appeals.

ARGUMENT FOR GRANTING A WRIT OF CERTIORARI

This is a case of first impression. It is the first case to present the federal question of whether Section 7(a)(1) of the Privacy Act establishes a privilege for an individual to withhold his or her Social Security number from an adverse litigant in civil discovery without risk of government compulsion.

The implications from the decision of the North Carolina Court of Appeals should not be underestimated. Fulmore's justification for demanding Howell's Social Security number is to enable her to invade his personal privacy by investigating whether he has multiple drivers' licenses and other vaguely described aspects of his background. This is essentially a test of Howell's credibility insofar as he has testified in deposition that he has one commercial drivers' license, issued by North Carolina. (Howell Dep. 9) (Howell's North Carolina driver's license number was revealed on the accident report prepared by the North Carolina Highway Patrol.) By Fulmore's reasoning, if the right to pursue background checks in a civil case to test credibility or discover other personal information about a litigant is the talisman to be applied in spite of the Privacy Act, then any witness, any deponent, is subject to coercive disclosure of his or her Social Security number upon demand by any other litigant.

A writ of certiorari should issue to the North Carolina Court of Appeals for the following reasons:

1. No decision of this Court explicates the scope of Section 7(a)(1) of the Privacy Act;

2. This Court should decide whether the "court ordered disclosure" exception for governmental disclosure of records in section 3 of the Act, 5 U.S.C. § 552a(b)(11), may be applied to an individual as an exception to Section 7(a)(1) or if the exceptions to disclosure embodied in Section 7(a)(2) are exclusive to Section 7;

3. This Court should decide whether Section 7(a)(1) of the Act preempts state statutes that would otherwise permit a state court to order an individual to disclose his or her Social Security number directly to an adverse party; and,

4. The prohibition in Section 7(a)(1) of the Privacy Act against governmental denial of any right, benefit or privilege for an individual's refusal to disclose his or her Social Security number implicates the scope of the informational privacy doctrine over which the state courts and United States Circuit Courts of Appeal are split.

A

Introduction

Efficiently summarizing the history and purpose of Section 7(a)(1), the Supreme Court of New York County, New York, has stated:

> Social security numbers were first adopted in 1936, when nine-digit account numbers were assigned to persons by the Secretary of Health and Human Services for the purpose of administering the Social Security laws (42 U.S.C. § 405[c][2][B]). Federal law provides that social security account numbers and related records that are obtained or maintained by "authorized persons" shall be confidential, and no "authorized person" shall disclose any such social security account number or related record (42 U.S.C. § 405[c][2][C][viii][I] [sic]).
>
> * * *
>
> It is beyond doubt that governmental officials of every stripe may demand disclosure of a social security number, subject to certain restrictions. The primary limitation is contained in the federal 1974 Privacy Act, which requires that any agency requesting disclosure of a SSN must "inform that individual whether that disclosure is mandatory or

voluntary, by what statutory authority such number is solicited, and what uses will be made of it" (5 U.S.C. § 552a[7][a][b][7])....It is noteworthy that, even when government demands the information, a citizen may assert a claim that the government lacks sufficient need to justify seeking the private information (see, for example, Russell v. Board of Plumbing Examiners of County of Westchester, 74 F.Supp.2d 339 [S.D.N.Y.1999], rearg. denied 74 F.Supp.2d 349, 45 Fed.R.Serv.3d 624 [S.D.N.Y.1999], affirmed 1 Fed.Appx. 38, 2001 WL 15628 [2d Cir.2001], master plumber application requirements imposed by a county; see also, Dittman v. California, 191 F.3d 1020 [9th Cir.1999], cert. denied, 530 U.S. 1261, 120 S.Ct. 2717, 147 L.Ed.2d 982 [2000], state requirement acupuncturist provide social security number upon applying for license renewal). The Privacy Act does permit injunctive relief by individuals against the government, albeit there must be proof of some actual damages to achieve even nominal damages (Doe v. Chao, 540 U.S. 614, 124 S.Ct. 1204, 157 L.Ed.2d 1122 [2004], social security number revealed when plaintiff's Black Lung claim forms distributed).

There is a broad federal policy against the government revealing

individuals' social security numbers. There are a variety of federal statutory restrictions on dissemination of such information, such as the federal Driver's Privacy Protection Act of 1994 (18 U.S.C. §§ 2721-2725; see Reno v. Condon, 528 U.S. 141, 151, 120 S.Ct. 666, 145 L.Ed.2d 587 [2000], act restricting states' ability to sell private data, which included social security numbers on driver license applications, was proper governmental exercise because it "regulates the States as the owners of data bases" being sold in interstate commerce).[FN3]
Additionally, where there is a demand for disclosure of social security numbers under federal or state freedom of information laws, such numbers are universally held to be confidential (see Sherman v. U.S. Dept. of Army, 244 F.3d 357 [5th Cir.2001], social security numbers are protected by concept of "informational privacy" and disclosure would be " unwarranted invasion of personal privacy" under 5 U.S.C. § 552[b][7][C]; State ex rel. Beacon Journal Publishing Co. v. City of Akron, 70 Ohio St.3d 605, 640 N.E.2d 164 [1994], under state open records law social security numbers of public employees subject to employees' legitimate expectation of privacy and "a federal right to privacy ... protects against governmental disclosure of the

private details of one's life")....

FN3. In Arakawa v. Sakata, 133 F.Supp.2d 1223, 1229-1230 (D.Haw.2001), the court reviewed the lower court decisions preceding the 2000 decision in Reno v. Condon, supra, and the few scattered decisions finding social security numbers were not confidential in the face of certain governmental interests. The court concluded "that there is a constitutional right to privacy in the information released about Plaintiff in this case, specifically his SSN" (133 F.Supp.2d at 1229). See also (Flavio L. Komuves, We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers, 16 J. Marshall J. Computer & Info. L. 529, 561-65 (1998); A. Michael Froomkin, The Death of Privacy?, 52 Stan.L.Rev. 1461 [2000]; Elbert Lin, Prioritizing Privacy: A Constitutional Response to the Internet, 17 Berkeley Tech. L.J. 1085 [2002]; and, Clifford S. Fishman, Technology and the Internet: The Impending Destruction of Privacy by Betrayers, Grudgers, Snoops, Spammers, Corporations, and the Media, 72 Geo. Wash. L.Rev. 1503 [2004]).

> The foregoing authorities reflect a broad recognition of the confidential nature of a social security number.

Meyerson v. Prime Realty Servs., Inc., 796 N.Y.S.2d 848, 851-52 (N.Y. Sup. Ct. 2005).

The legislative history of the Privacy Act demonstrates indisputably Congress' concern about potential misuse of Social Security numbers and its intention to provide a legislative basis for individual refusal to disclose them. The Senate Committee that approved the language of Section 7 stated in its report that:

> If the SSN is to be stopped from becoming a defacto [sic] Standard Universal Identifier, the individual must have the option not to disclose his number unless required to do so by the Federal Government for legitimate Federal program purposes, **and there must be legal authority for his refusal**. Since existing law offers no such clear authority, **we recommend specific, *preemptive*, Federal legislation providing that the individual has the right to refuse to disclose his SSN to any person or organization that does not have specific authority provided by federal statute to request it**...and the

> right to redress if his lawful refusal to disclose his SSN results in the denial of a benefit.

1974 U.S.C.C.A.N. 6916, 6945 (emphasis added).[2] Section 7 is part of Congress' response to this concern. Section 7(a)(1) provides that,

> It shall be unlawful for any federal, state or local government agency to deny any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his Social Security account number.

Since the enactment of Section 7, identity theft and its adverse impacts on associated interests have grown exponentially, presaged accurately by Congress' concerns in 1974. Numerous private and governmental studies have examined the issue of identity security and the significant role that Social Security numbers play in this crime. In 2003, the United States General Accounting Office recognized that:

> [a]s a result of the increased use and availability of SSN information and other data, more and more personal information is being centralized into various corporate and public databases. Because SSNs are often the identifier

---

[2] This language was adopted from a 1973 report by the Department of Health, Education and Welfare, "Records, Computers and the Rights of Citizens."

> of choice among individuals seeking to create false identities, to the extent that personal information is aggregated *in public and private sector* databases, it becomes vulnerable to misuse.
>
> * * *
>
> The ease of access the Internet affords could encourage individuals to engage in information gathering from public records on a broader scale than they could before when they had to visit a physical location and request or search for information on a case-by-case basis.... Further, as [the Social Security Administration] closes off many avenues of unauthorized access to SSNs, perpetrators of fraud will likely shift their strategies to less protected areas.

Barbara D. Bourbjerg, U.S. Gen. Accounting Office, Social Security Numbers: Ensuring the Integrity of the SSN GAO-03-941T (2003).

The Federal Trade Commission found that approximately 8.3 million adults in the United States were victims of some form of identity theft in 2005. Of these individuals, 1.8 million reported misuse of their personal information including Social Security numbers. This survey estimated total losses from identity theft in 2006 of approximately 15.6 billion dollars. Synovate,

Federal Trade Commission-2006 Identity Theft Survey Report (2007).

In a supplement to its 2003 report, the United States Government Accountability Office reported in June 2007 that, despite the implementation of truncation of Social Security numbers by federal agencies, "identity thieves may still be able to reconstruct full SSNs by combining different truncated versions of the SSN available from public and private sources." Social Security Numbers: Federal Actions Could Further Decrease Availability in Public Records, Though Other Vulnerabilities Remain GAO-07-752 (2007); see also Flavio L. Komuves, We've Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers, 16 J. Marshall J. Computer & Info. L. 529, 561-65 (1998).

Thus, Fulmore's expressed intention to put Mr. Howell's Social Security number on the internet, into undisclosed third party search engines outside the supervision of the trial court, is extremely troubling. Once Mr. Howell's Social Security number is digitized on the internet, he loses all control over its use by others and is easily subject to the worst kinds of financial fraud and identity theft. The issue Petitioners bring to this Court, therefore, is far more than an intellectual exercise.

B

No decision of this Court explicates the scope of Section 7(a)(1) of the Privacy Act.

It appears that this Court has never been presented with the opportunity to consider the scope of Section 7(a)(1). The Court has construed other provisions of the Privacy Act which, as discussed below, highlights the need for the Court to grant certiorari in this case. Thus far, the Court has held that actual damages are required to qualify for the minimum statutory award of damages under section 3 of the Privacy Act, 5 U.S.C. § 552a(g)(4), which limits federal agency disclosure of Social Security numbers. Doe v. Chao, 540 U.S. 614 (2004). In 1989, the Court relied on other provisions of the Privacy Act as a basis for citing recognized governmental concerns over the privacy of criminal databases. United States Dept. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989). This has added significance because the North Carolina Court of Appeals is the only known court to decide the question presented. Therefore, in the thirty-four years since enactment of the Privacy Act, this Court has not had the opportunity to consider the scope of Section 7(a)(1). The Court should do so now, given the posture of this case and the particular importance it holds for identity-privacy issues pertinent today.

C

This Court should decide whether the "court ordered disclosure" exception for governmental disclosure of records in section 3 of the Act, 5 U.S.C. § 552a(b)(11), applies to an individual as an exception to Section 7(a)(1) or if the exceptions to disclosure embodied in Section 7(a)(2) are exclusive to Section 7.

To justify its ruling, the North Carolina Court of Appeals improperly borrowed from section 3 of the Privacy Act, 5 U.S.C. § 552a(b)(11), to create a new exception to Section 7(a)(1). By doing so, it judicially added eleven new exceptions to Section 7 and eviscerated the prohibition of Section 7(a)(1).

Section 7 of the Privacy Act contains two exceptions to the prohibition against governmentally required disclosure of Social Security numbers. Section 7(a)(2) provides that:

> The provisions of paragraph (1) of this subsection shall not apply with respect to–
>
> (A) any disclosure which is required by federal statute, or
>
> (B) the disclosure of a Social Security number to any federal, state or local agency maintaining a system of records in existence and operating before

> January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

Based on the "federal statute exception," Section 7(a)(2)(A), courts have approved mandatory disclosure of Social Security numbers for issuance of drivers' licenses, Kasler v. Howard, 323 F. Supp. 2d 675 (W.D.N.C. 2003); low income housing, Claugus v. Roosevelt Island Hous. Mgmt. Corp., No. 96CIV8155, 1999 WL 258275 (S.D.N.Y. Apr. 29, 1999); federal travel advances for state department employees, Brookens v. United States, 627 F.2d 494 (D.C. Cir. 1980); qualification for Aid to Families with Dependent Children, Chambers v. Klein, 419 F. Supp. 569 (D.N.J. 1976); purchase of recreational (i.e., fishing) licenses, Montana v. Walter, No. 01-356, 43 F.3d 983, 2001 WL 1636930 (Mont. Dec. 21, 2001); and, issuance of professional licenses, Lord v. Bd. of Chiropractic Exam's, 739 So. 2d 273 (La. Ct. App. 1999). One court even held that Section 7(a)(1) prohibited the Selective Service System from requiring disclosure of Social Security numbers, Wolman v. United States Selective Serv. Sys., 501 F. Supp. 310 (D.D.C. 1980), after which Congress amended the Selective Service Act so that mandatory disclosure of Social Security numbers falls within the "other federal statute" exception of Section 7(a)(2)(A). See Department of Defense Authorization Act, 1982, Pub. L. No. 97-86, 95 Stat. 1099 (1981); Wolman v. United States, 542 F. Supp. 84 (D.D.C. 1982). Other "federal statute" exceptions include:

birth certificates, 42 U.S.C. § 405(c)(2)(C)(ii); federal crop insurance, 42 U.S.C. § 405(c)(2)(C)(iv); longshore and harbor workers compensation, 42 U.S.C. § 405(c)(2)(C)(ix); blood donation, 42 U.S.C. § 405(c)(2)(D)(i)(I); and, jury selection, 42 U.S.C. § 405(c)(2)(E)(i)(II). Indeed, instead of relying on section 552a(b) to authorize exceptions to Section 7, in 1976, Congress amended the Social Security Act to allow mandated disclosure of Social Security numbers for "the administration of any tax, general public assistance, driver's license, or motor vehicle registration law." 42 U.S.C. § 405 (c)(2)(C)(i).

Lacking an applicable Section 7(a)(2) exception, however, the North Carolina Court of Appeals improperly resorted to 5 U.S.C. § 552a(b)(11) to hold that a court may require an individual to disclose his or her Social Security number directly to an adverse litigant. The failure of this approach is readily observable by the very language of section 552a(b)(11) (enacted as section 3 of the Privacy Act) which states:

> (b) Conditions of disclosure. No ***agency*** shall disclose any record which is ***contained in a system of records*** by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be–

* * *

(11) pursuant to the order of a court of competent jurisdiction ...

(emphasis added). First, the language of this provision is clear that section 552a(b) prohibits only agencies from disclosing Social Security numbers. That is to say, this case does not present an instance of "agency" disclosure, as the trial court does not have Mr. Howell's Social Security number to disclose: the trial court does not have, and has never had, Mr. Howell's Social Security number. Therefore, section 552a(b) limitations on agency disclosure cannot authorize agency disclosure of data the agency does not have.

Further, 5 U.S.C. §552a(b)(11) applies to disclosures only by **agencies**, not individuals. The very first sentence of the section relied on by the North Carolina Court of Appeals states that "no **agency** shall disclose any record..." 5 U.S.C. §552a(b) (emphasis added). Section 552a defines both "agency" and "individual" clearly distinguishing between the two. See 5 U.S.C. § 552a(a)(1) & (2). This distinction is important in recognizing the error of the Court of Appeals because Section 7(a)(1) empowers an individual to withhold his or her Social Security number even in the face of government coercion—it does not regulate governmental dissemination of Social Security numbers. Therefore, juxtaposed to section 552a(b)(11), Section 7(a)(1) has nothing to do with agency disclosure; rather, it establishes a

personal right to withhold a Social Security number irrespective of limitations on agency disclosure elsewhere in the Privacy Act. Thus, the North Carolina Court of Appeals improperly departed from Section 7 to section 3 of the Privacy Act, creating error in the application of federal law that can be rectified only by this Court.

For purposes of subsection 552a(b), "agency" is defined by 5 U.S.C. § 552(f)(1)[3] and is limited to "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." This is inconsistent with the prohibitory language of Section 7 that expressly applies to federal, **state and local** government agencies. Clearly, if the eleven section 552a(b) exceptions apply to Section 7 (and thereby the § 552(f) definition), then Section 7 does not apply to state and local governments despite its express language that it does so apply. Such circular reasoning would produce a manifest absurdity of statutory construction.

Finally, the North Carolina Court of Appeals' reliance on section 552a(b)(11) is ill-

---

[3] Although 5 U.S.C. § 552a(a)(1) presently and as enacted defines "agency" with reference to section 552(e), section 552(e) was redesignated as subsection (f) in 1986. Anti-drug Abuse Act of 1986, Pub. L. No. 99-570, § 1802(b), 100 Stat. 3207 (1986).

founded because the trial court's order to Mr. Howell to disclose his Social Security number is not an order to disclose information from a "*system of records*" as *contemplated by exception* 11. Section 552a(b)(11) provides that "no agency shall disclose any record which is **contained in a system of records**" except "pursuant to the order of a court." "System of records" is defined as a "group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). That is not what occurred in this instance: the trial court did not order an agency to disclose a record of Mr. Howell contained in a system of records, but ordered Mr. Howell, an individual, to disclose his Social Security number directly to an adverse party. Therefore, the Section 552a(b)(11) exception is inapplicable to Section 7(a)(1), further demonstrating the flawed logic of the Court of Appeals.

Thus, the North Carolina Court of Appeals' decision raises important questions regarding first impression statutory interpretation of a unique federal law. Section 7 carries its own exceptions to its prohibition on government mandated individual disclosure. By ignoring those exceptions and borrowing from the codified exceptions contained in a different subsection of the Privacy Act, the North Carolina Court of Appeals confused issues related to federal agency disclosure law and rendered superfluous the only

two exceptions to Section 7, all which merit this Court's attention.

D

This Court should decide whether Section 7(a)(1) of the Act preempts state statutes that would otherwise permit a state court to order an individual to disclose his or her Social Security number directly to an adverse party

The North Carolina Court of Appeals left unanswered the important question of the extent of the applicability of Section 7 in civil litigation and whether state statutes, in particular North Carolina General Statute section 132-1.10,[4] are preempted by Section 7. The Court should grant certiorari to determine the extent that Section 7 preempts inconsistent state and local laws.

Currently, there exists a patchwork of statutory enactments, court rules and decisional law regarding mandatory disclosure of Social Security numbers. See Cal. Gov't. Code § 68107 (West, Westlaw through Ch. 763 of 2008 Reg. Sess.

---

[4] Similar to section 3 of the Privacy Act, North Carolina General Statute section 132-1.10 prohibits **agency** disclosure of Social Security numbers, with limited exceptions. One of the exceptions permits **agency** disclosure pursuant to a court order. N. C. Gen. St. § 132-1.10 (c)(2). None of the prohibitions to which the "court order" exception would apply are available to require an individual to disclose his Social Security number to an agency or to the court for dissemination directly to an adverse party.

and Ch. 7 of 2007-2008 Third Ex. Sess.) (court may order disclosure of Social Security number to assist with collection of criminal fine or forfeiture); Alaska Stat. § 47.12.170 (West, Westlaw through Oct. 2008 amendments) (order of restitution for civil judgment against minor must include Social Security number); Or. Rev. Stat. § 18.042 (West, Westlaw through 2008 Special Sess.) (Rules of Civil Procedure, courts and judges may require disclosures of Social Security number for enforcement of judgments or court orders); Va. Code Ann. § 19.2-305.1 (West, Westlaw through 2008 Special Sess. II) (court may require Social Security number be disclosed as part of restitution plan); and L.R., D. Mass. 67.3 (Social Security number must be furnished for distribution of money from registry of court). While the Federal Rules of Civil Procedure now inconsistently recognize a person's privacy interest in his or her Social Security number, see Fed. R. Civ. P. 5.2(a),[5] some trial and appellate courts (not having addressed the question presented herein) have required civil litigants to disclose Social Security numbers. See NBA Properties, Inc. v. Untertainment Records LLC, No. 99 CIV. 2933, 1999 WL 1103006 (S.D.N.Y. Dec. 6, 1999) (disclosure of Social Security number of potential witness permitted when he could not be located by last known address); Fink v. Moreno, Becerra &

---

[5] Rule 5.2 prohibits filings including Social Security numbers absent Court order. Arguably, this falls within the "other federal statute" exception in Section 7(a)(2) as the Federal Rules of Civil Procedure are codified in the appendix to Title 28 of the United States Code.

Guerrero, Inc., No. B196118, 2008 WL 2154074 (Cal. Ct. App. May 23, 2008) (trial court did not abuse discretion by requiring production of last four digits of Social Security number); Busse v. Motorola, Inc., 813 N.E.2d 1013 (Ill. App. Ct. 2004) (Social Security number is not private information); but cf. Cartwright v. Midtown Hosp., 534 S.E.2d 504 (Ga. Ct. App. 2000) (dictum) (unfettered access to expert witness' Social Security number not proper); Meyerson v. Prime Realty Servs., LLC, 796 N.Y.S.2d 848 (N.Y. Sup. Ct. 2005) (landlord could not demand Social Security number based on New York consumer protection laws); Arnold v. Am. Nat'l Red Cross, 639 N.E.2d 484 (Ohio Ct. App. 1994) (trial court abused discretion in ordering disclosure of donor's name, address and Social Security number).

Federal preemption derives from the Supremacy Clause of the United States Constitution. It is well-settled that the Supremacy Clause invalidates state laws that interfere with or are contrary to federal law. See Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) (Supremacy Clause invalidates "state laws that 'interfere with, or are contrary to the laws of [C]ongress, made in pursuance of the [C]onstitution' "). Preemption occurs in three different situations. First, Congress can expressly preempt state law by directly stating its intention to do so. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Second, absent explicit preemptive language, Congress can occupy the field by regulating so pervasively that there is no room left

for the states to supplement federal law. Fidelity Sav. & Loan Assoc. v. de la Cuesta, 458 U.S. 141, 153 (1982). Third, even when Congress has neither expressly preempted state law nor occupied the field, a state law is per se preempted to the extent that it actually conflicts with federal law. Pacific Gas and Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983). Under conflict pre-emption, a state law is preempted to the extent that it actually conflicts with federal law, Florida Lime and Avacado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or sharply interferes with contrary to federal law. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990).

The Privacy Act preempts North Carolina General Statute section 132-1.10 to the extent that the two are inconsistent. While Section 7 of the Privacy Act and section 132-1.10 of the North Carolina General Statutes do not conflict per se – Section 7 creates a privilege of individual nondisclosure, whereas North Carolina General Statute section 132-1.10 regulates an agency's collection and dissemination of Social Security numbers – Section 7 preempts the North Carolina statute in that it occupies the field to create an individual right to withhold his or her Social Security number. The plain language of Section 7 leaves no room for a state agency to deny a right to any individual, such as defending himself or herself against negligence claims, for failure to disclose his or her Social Security number. Therefore, this Court should grant certiorari so

that other states and courts will be able to address the effect of Section 7(a)(1) in relation to other rules that may improperly require disclosure of an individual's Social Security number.

E

The prohibition in Section 7(a)(1) of the Privacy Act against governmental denial of any right, benefit or privilege for an individual's refusal to disclose his or her Social Security number implicates the scope of the informational privacy doctrine over which the state courts and the United States Circuit Courts of Appeal are split.

The decision of the North Carolina Court of Appeals implicates the informational privacy doctrine and whether a person's privacy interest in his or her Social Security number is overcome in civil litigation based on a routine civil discovery standard of "reasonably calculated to lead to the discovery of admissible evidence." See Fed. R. Civ. P. 26(b)(1); N.C. Gen. Stat. § 1A-1, Rule 26 (West, Westlaw through 1987 Amendments). Indeed, this Court has yet to articulate the boundaries and scope of interests protected under Constitutional concepts of informational privacy; and, state and federal courts are in wide disagreement on the informational privacy doctrine as it relates to Social Security numbers, subjecting litigants in different venues to different standards for civil discovery of Social Security numbers.

Any discussion of constitutionally protected privacy rights in records such as those at issue here must begin with Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). In Whalen, . . . [the Supreme] Court explained that there are two types of privacy interests that may be constitutionally protected. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Id. at 599-600, 97 S.Ct. 869; see also Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 457, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); In re Crawford, 194 F.3d 954, 958 (9th Cir. 1999). The Court did not elaborate, however, on the extent of the constitutional privacy protection, because it held that the state statutory scheme evidenced "a proper concern with, and protection of, the individual's interest in privacy." See id. at 605-06, 97 S.Ct. 869 ("We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data ...").

In the years since Whalen, courts have struggled to define the limits of a constitutional right to privacy, especially with respect to disclosure of

personal matters. See, e.g., Crawford, 194 F.3d at 958 ("the Supreme Court has expressed uncertainty regarding the precise bounds of the constitutional 'zone of privacy' "); Kallstrom v. Columbus, 136 F.3d 1055, 1060 (6th Cir. 1998) ("the boundaries of the right to privacy have not been clearly delineated"); American Federation of Govt. Employees v. Dept. of Housing and Urban Dev't, 118 F.3d 786, 793 (D.C.Cir. 1997) ("numerous uncertainties attend this issue"); Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996) ("the exact boundaries of this right are, to say the least, unclear"); James v. Douglas, 941 F.2d 1539, 1543 (11th Cir. 1991) ("the constitutional right to privacy has vague contours and has been in a state of flux in recent years"); Woods v. White, 689 F.Supp. 874, 875 (W.D.Wis. 1988) ("the Supreme Court has given little specific guidance in defining privacy rights") aff'd 899 F.2d 17 (7th Cir. 1990). Several courts have found that there exists a violation of a constitutional privacy right in the public disclosure of private medical information, but beyond this, there is no real consensus. See, e.g., Doe v. Attorney General, 941 F.2d 780 (9th Cir. 1991) (collecting cases); Doe v. New York, 15 F.3d 264 (2d Cir. 1994); United States v. Westinghouse Elec. Corp., 638

F.2d 570 (3d Cir. 1980); Woods, 689 F.Supp. 874.

Arakawa v. Sakata, 133 F. Supp. 2d 1223, 1226 (D. Haw. 2001).

This Court recognized in 1989, based on the Privacy Act, that there is a strong privacy interest in the non-disclosure of compiled computer information. United States Dep't. of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 766 (1989) (disclosure of contents of FBI rap sheet to third party could constitute unwarranted invasion of personal privacy). One state, Ohio, has recognized a United States constitutional right of privacy in Social Security numbers. See State ex rel. Beacon Journal Publ'g Co. v. City of Akron, 640 N.E.2d 164 (Ohio 1994) (relying in part on Section 7 of the Privacy Act). Although declining to give privacy interests in Social Security numbers constitutional protection, the Ninth Circuit recognized that disclosure of Social Security numbers "can raise serious privacy concerns," and "that the indiscriminate public disclosure of SSNs, especially when accompanied by names and addresses, may implicate the constitutional right to informational privacy." In re Crawford, 194 F.3d 954, 958 (9th Cir. 1999). That court also recognized that the Sixth Circuit Court of Appeals "has disavowed the notion of informational privacy as a constitutionally protected interest. . . ." Id. at n.4 (noting that the Sixth Circuit's position represents the minority view.)

Likewise, Sherman v. United States Dep't of the Army, 244 F.3d 357 (5th Cir. 2001), supported by Section 7 of the Privacy Act, recognized a substantial privacy interest in a person's Social Security number. Id. at 365. The court noted that "the concern is that the simultaneous disclosure of an individual's name and confidential SSN exposes that individual to a heightened risk of identity theft and other forms of fraud." Id. Relying on Crawford, the Ninth Circuit, in Nelson v. Nat'l Aeronautics and Space Admin., 530 F.3d 865 (9th Cir. 2008), although stopping short of recognizing a constitutional interest in Social Security number privacy, found that the informational privacy doctrine places on the government the burden to show that the information would advance a legitimate state interest and that the government action is narrowly tailored to meet that interest. Id. at 877. New Jersey recognizes a state constitutional right of privacy in Social Security numbers, Burnett v. County of Bergen, 954 A.2d 483 (N.J. Super. Ct. App. Div. 2008), and Florida has recognized under its constitution that there is a legitimate expectation to privacy in Social Security numbers. Thomas v. Smith, 882 So. 2d 1037 (Fla. Dist. Ct. App. 2004).

By contrast, the Sixth Circuit applies a different approach to assessing informational privacy claims. First, recognizing that Congress and many courts "have recognized the privacy interest in one's Social Security number," Lambert v. Hartman, 517 F.3d 433, 442 (6th Cir. 2008), and

the indiscriminate public disclosure of Social Security numbers might implicate constitutional privacy interests, that court requires that the asserted privacy interest implicate a fundamental right. Id.

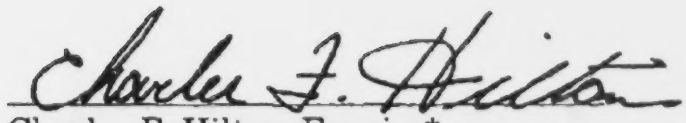
Accordingly, depending on what state or circuit where one may be bound up in litigation, there is an inconsistent and unpredictable treatment of mandatory disclosure of Social Security numbers. This is deserving of this Court's attention so that federal and state courts will know whether privacy interests in a Social Security number rise to a federal constitutional level; and, so that civil discovery and disclosure of Social Security numbers will be consistent.

CONCLUSION

For the foregoing reasons, Petitioners submit that the North Carolina Court of Appeals erred in this case of first impression. The Court of Appeals' interpretation of Section 7(a)(1) of the Privacy Act raises questions regarding the statutory interpretation of the Privacy Act, preemption, and the informational privacy doctrine as applied inconsistently among the states and federal circuit courts of appeal. Petitioners, therefore, request this Court to grant certiorari to the North Carolina Court of Appeals

so these important federal issues can be reviewed and addressed fully by this Court.

Respectfully submitted,
Gregory A. Howell and
PFS Distribution Company



Charles F. Hilton, Esquire*
Thomas E. Ullrich, Esquire
Wharton, Aldhizer & Weaver, P.L.C.
100 South Mason Street
Post Office Box 20028
Harrisonburg, VA 22801-7528
Telephone: (540) 438-5301
Facsimile: (540) 434-5502
Counsel for Petitioners
**Counsel of Record*

APPENDIX A

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAYNE COUNTY, NORTH CAROLINA
FILE NO. 2006CVS23

Mary E. Fulmore, Administrator
of the Estate of Priscilla Ann Maultsby,

Plaintiff,

v.

Gregory A. Howell and
PFS Distribution Company, Inc.,

Defendants/Third-Party Plaintiff,

v.

Ina Loftin Harper,

Third-Party Defendant.

ORDER ON PLAINTIFF'S MOTION TO COMPEL DEFENDANT GREGORY HOWELL TO RESPOND TO PLAINTIFF'S DEPOSITION QUESTIONS

This cause coming on to be heard by the Honorable Thomas D. Haigwood, Judge Presiding over the March 14, 2007 session of Civil Superior

Court for Wayne County upon a motion by the Plaintiff to compel Defendant Gregory Howell to provide complete answers to certain deposition questions and this Court is of the opinion that the motion should be allowed.

The Court finds, the Defendants' arguments notwithstanding, that such information is not privileged pursuant to NCGS § 32.1-10, 18 USCA §§ 2721, 2725 or the Federal Privacy Act of 1974, PL 93-579, DECEMBER 31, 1974, 88 Stat 1896.

IT IS THEREFORE ORDERED that the Defendant Gregory Howell shall appear at a deposition called by the plaintiff pursuant to the North Carolina Rules of Civil Procedure to answer the questions propounded to him, to wit:

1. What is your driver's license number?

2. What is your Social Security number?

3. What non-privileged documents did you review with your attorney in preparation for your deposition?

Regarding item 3, the Defendant argues that all items Defendant Howell reviewed with his attorney are privileged pursuant to the attorney client privilege and the attorney work product doctrine, and cited to the Court the official commentary following Rule 612 of the North Carolina Rules of Evidence. The Defendant also cited to the Court the legislative history and

decisional authorities related to Rule 612 of the Federal Rules of Evidence. The Court finds that Mr. Howell reviewed documents with his attorney prior to his deposition, in preparation for the deposition, and that the plaintiff's need to cross examine him about that qualifies as the ends of justice sufficient to require his testimony about his review of such documents with his attorney.

Upon receipt of defendant's responses, neither the Plaintiff, counsel for the Plaintiff, nor any persons retained by Plaintiff shall cause this information to be disclosed to anyone outside the purpose of the investigation of the circumstances surrounding this lawsuit. Upon the resolution of this lawsuit, any documents containing the information regarding Defendant Howell's driver's license and Social Security numbers shall be purged.

The Plaintiff shall be allowed to ask Defendant Howell additional questions resulting from any supplemental discovery produced by the Defendants as ordered by this Court.

This the 5th day of April 2007.

/s/
Superior Court Judge Presiding

APPENDIX B

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAYNE COUNTY, NORTH CAROLINA
FILE NO. 2006CVS23

Mary E. Fulmore, Administrator
of the Estate of Priscilla Ann Maultsby,

Plaintiff,

v.

Gregory A. Howell and
PFS Distribution Company, Inc.,

Defendants/Third-Party Plaintiff,

v.

Ina Loftin Harper,

Third-Party Defendant.

ORDER ON PLAINTIFF'S SECOND AMENDED MOTION TO COMPEL GREGORY HOWELL TO RESPOND TO PLAINTIFF'S INTERROGATORIES

This cause coming on to be heard by the Honorable Thomas D. Haigwood, Judge Presiding over the March 14, 2007 session of Civil Superior Court for Wayne County upon a motion by the

Plaintiff to compel Defendant Gregory Howell to provide complete answers to Interrogatory No. 3. of Plaintiff's Interrogatories served on Defendant Howell and this Court is of the opinion that the motion should be allowed.

The Court finds, the Defendants' arguments notwithstanding, that such information is not privileged pursuant to NCGS § 32.1-10, 18 USCA §§ 2721, 2725 or the Federal Privacy Act of 1974, PL 93-579, DECEMBER 31, 1974, 88 Stat 1896.

IT IS THEREFORE ORDERED: that the Defendant Gregory Howell shall, within fourteen (14) days, provide to Plaintiff's counsel full and complete responses to Interrogatory No. 3, which specifically states: "Please state your driver's license number, state of issue. . . and Social Security Number."

The Plaintiff shall bear her costs and fees in the prosecution of this motion.

This the 5th day of April 2007.

/s/ _____
SUPERIOR COURT JUDGE PRESIDING

APPENDIX C

No. COA07-984
NORTH CAROLINA COURT OF APPEALS
Filed: 4 March 2008

MARY E. FULMORE,
ADMINISTRATOR OF THE ESTATE
OF PRISCILLA ANN MAULTSBY,
Plaintiff,

v.

Wayne County
No. 06 CVS 23

GREGORY HOWELL and PFS
DISTRIBUTION COMPANY, INC.,
Defendants/Third Party
Plaintiffs,

v.

INA LOFTIN HARPER,
Third Party Defendant.

Appeal by Defendants from orders entered 5 April 2007 by Judge Thomas D. Haigwood in Wayne County Superior Court. Heard in the Court of Appeals 6 February 2008.

Joretta Durant, for Plaintiff-Appellee.

Wharton, Aldhizer & Weaver, P.L.C., by Charles F. Hilton and Thomas E. Ullrich, pro hac vice, and Teague, Rotenstreich

Stanoland, by Paul A. Daniels, Defendants-Appellants.

The Cochran Firm, by Hezakiah Sistrunk and Shean Williams, for Plaintiff.

Wallace, Morris, Barwick, Landis & Stroud, by Stuart L. Stroud, for Third-Party Defendant.

ARROWOOD, Judge.

Gregory A. Howell (Howell) and PFS Distribution Company, Inc., (PFS together, Defendants), appeal from orders entered 5 April 2007 allowing the motions of Mary E. Fulmore, administrator of the estate of Priscilla Ann Maultsby (Plaintiff), to compel Howell to disclose (1) his social security number; (2) all non-privileged documents that Howell reviewed with his attorney in preparation for his deposition; and (3) the accident report generated by Howell and PFS's former Safety Director, Tommy Lawrimore (Lawrimore), on 6 August 2004. We conclude the trial court did not abuse its discretion in issuing the orders.

Pilgrim's Pride, a corporation employing drivers of tractor-trailers to carry freight, merged with PFS on 29 September 2004, and owned a tractor-trailer operated by Howell, an employee of Pilgrim's Pride and PFS. On 5 August 2004, Howell approached a curve in the road while driving the tractor-trailer, and saw a car driven by Ina Harper approaching the tractor-trailer in the

wrong lane of traffic. Howell made an effort to avoid colliding with Harper and, according to the allegations in Plaintiff's complaint, crossed the center line. Thereafter, the tractor-trailer driven by Howell collided with Priscilla Maultsby's vehicle. As a result of the collision, Maultsby died. Plaintiff alleged that Maultsby's death was caused by the negligence of Howell and Defendants.

On 5 August 2004, Lawrimore began his investigation of the accident, and on 6 August 2004, Howell completed, on a pre-printed form, an accident report as required by Pilgrim's Pride Fleet Safety Manual, section s 13.1-13.6 and 16.13-16.14. Lawrimore also signed the report, and stated in his deposition that the accident report was made in the normal course of business, pursuant to the Pilgrim's Pride Fleet Safety Manual.

On 6 August 2004, Pilgrim's Pride contacted legal counsel, Mr. Thomas E. Ullrich (Ullrich), and requested that Ullrich direct the investigation of the collision for Pilgrim's Pride. The same day, Ullrich contacted Lawrimore, and assumed responsibility for the investigation. Prior to Ullrich's contact, Lawrimore and Howell had begun preparing the accident report pursuant to company policy.

On 2 February 2007, Plaintiff filed a motion to compel discovery seeking disclosure of the accident report prepared by Howell and Lawrimore after the collision. Plaintiff also sought discovery of Howell's social security number, and the non-privileged documents which Howell reviewed with

his attorney in preparation for his deposition. On 10 April 2007, the trial court entered orders requiring that Defendants disclose the foregoing documents and social security number. From these orders, Defendants appeal.

As an initial matter, we note that Defendants' appeal is interlocutory. Our Supreme Court has held, however, that "[t]he trial court's determination of the applicability of the [attorney-client] privilege or disclosure affects a substantial right and is therefore immediately appealable." *In re Investigation of Death of Eric Miller,* 357 N.C. 316, 343, 584 S.E.2d 772, 791 (2003); *see also Sharpe v. Worland,* 351 N.C. 159, 522 S.E.2d 577 (1999). Accordingly, this appeal is properly before the Court.

Our Standard of review "of a trial court's discovery order is . . . deferential: the order will only be upset on appeal by a showing that the trial court abused its discretion." *Isom v. Bank of Am., N.A.,* 177 N.C. App. 406, 410, 628 S.E.2d 458, 461 (2006). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Nationwide Mut. Fire Ins. Co. v. Bourlon,* 172 N.C. App. 595, 601, 617 S.E.2d 40, 44 (2005).

Federal Privacy Act of 1974

In their first argument, Defendants contend that the trial court abused its discretion by requiring Howell to produce his social security

number, because such compelled disclosure violated the Federal Privacy Act of 1974. We disagree.

The purpose of the Federal Privacy Act of 1974 (the Act) was to regulate the "collection, maintenance, use, and dissemination of personal information by Federal agencies[j" such that individuals were "provide[d] certain safeguards . . against an invasion of personal privacy[.]" section 7 of the Act extends specifically to the protection of the disclosure of an individual's social security number. section 7 of the Federal Privacy Act of 1974, Act of December 31, 1974, P.L. 93-579, § 7, 88 Stat. 1909, included in the History, Ancillary Laws and Directives of 5 U.S.C. § 552a, states the following:

> (a) (1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.
>
> (2) the provisions of paragraph (1) of this subsection shall not apply with respect to -
>
> (A) any disclosure which is required by Federal statute, or
>
> (B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted

> prior to such date to verify the identity of an individual.

The Act also provided exemptions to the general guidelines proscribing disclosure, specifically stating, in pertinent part, that individual records collected under the Act "shall [not be] disclosed" to "any person, or to another agency" unless disclosure would be "to an instrumentality of any governmental jurisdiction . . . for a civil or criminal law enforcement activity" or "pursuant to the order of a court of competent jurisdiction." Federal Privacy Act of 1974, Act of December 31, 1974, P.L. 93-579, § 7, 88 Stat. 1909; 5 U.S.C. § 552a(b)(11) (1974).

N.C. Gen. Stat. § 132-1.10 (2007), also recognizes the importance of regulating the disclosure of an individual's social security number by agencies or political subdivisions of the State, stating that the "social security number can be used as a tool to perpetuate fraud against a person and to acquire sensitive personal, financial, medical, and familial information, the release of which could cause great financial or personal harm to an individual." N.C. Gen. Stat. § 132-1.10(a) (1) (2007). This notwithstanding, the statute also recognizes "legitimate reasons for State and local government agencies to collect social security numbers and other personal identifying information from individuals[.]" N.C. Gen. Stat. § 132-1.10(a) (2) (2007). Agencies and political subdivisions must "minimize the instances this information is disseminated either internally within government or externally with the general

public." N.C. Gen. Stat. § 132- 1.10(a) (3). To protect an individual's social security number, N.C. Gen. Stat. § 132-1.10, requires the following:

> (b) Except as provided in subsections (c) and (d) of this section, no agency of the State or its political subdivisions, or any agent or employee of a government agency, shall do any of the following:
>
> (1) Collect a social security number from an individual unless authorized by law to do so or unless the collection of the social security number is otherwise imperative for the performance of that agency's duties and responsibilities as prescribed by law. Social security numbers collected by an agency must be relevant to the purpose for which collected and shall not be collected until and unless the need for social security numbers has been clearly documented.
>
> . . . .
>
> (c) Subsection (b) of this section does not apply in the following circumstances:
>
> (2) To social security numbers or other identifying information disclosed pursuant to a court order, warrant, or subpoena.

Citing the Supremacy Clause of the United States Constitution, Article VI, Clause 2, Defendants specifically argue that the court's order requiring Howell to disclose his social

security number violated Section 7 of the Federal Privacy Act, and that the exemption for court orders in N.C. Gen. Stat. § 132-1.10, is preempted by the Act. Defendants, however, fail to recognize that the Act also provided an exemption for court orders. *See* Federal Privacy Act of 1974, Act of December 31, 1974, P.L. 93-579, § 7, 88 Stat. 1909; 5 U.S.C. § 552a(b) (11) (1974) (stating that individual records collected under the Act "shall [not be] disclosed" to "any person, or to another agency" unless disclosure would be "to an instrumentality of any governmental jurisdiction . . . for a civil or criminal law enforcement activity" or "pursuant to the order of a court of competent jurisdiction"). Notably, and contrary to Defendants' assertions on appeal, both N.C. Gen. Stat. § 132-1.10, and the Federal Privacy Act of 1974 contain exceptions to the general guidelines proscribing an agency or political subdivision's disclosure of an individual's social security number for court orders.

Because the trial court's order compelling discovery of Howell's social security number falls squarely within the exemption for court orders in both N.C. Gen. Stat. § 132-1.10, and the original Federal Privacy Act of 1974, which Defendants submit as authority for their argument, we conclude that the trial court did not abuse its discretion. We further note that the trial court here took measures to minimize the potential loss of privacy resulting from Howell's disclosure of his social security number, requiring that all records be purged upon the completion of the lawsuit pursuant to N.C.R. Civ. P. 26(c). This assignment of

error is overruled.

Attorney-Client Privilege & Work-Product

Defendants next argue that the trial court abused its discretion by compelling Howell to disclose all non-privileged documents that Howell reviewed with his attorney in preparation for his deposition, because the documents were protected by the attorney-client privilege and the doctrine of work product. We disagree.

Our Supreme Court has held that, in deciding whether the attorney-client privilege attaches to a particular communication, the trial court must consider whether:

> "(1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege."

In Re Miller, 357 N.C. at 335, 584 S.E.2d at 786 (quoting *State v. McIntosh,* 336 N.C. 517, 523-24, 444 S.E.2d 438, 442 (1994)). "If any one of these five elements is not present in any portion of an attorney-client communication, that portion of the

communication is not privileged." *Id.* The party who claims the privilege bears the burden of demonstrating that the communication at issue meets all the requirements of the privilege. *Id.* at 336, 584 S.E.2d at 787.

The work product doctrine prohibits an adverse party from compelling "the discovery of documents and other tangible things that are 'prepared in anticipation of litigation' unless the party has a substantial need for those materials and cannot 'without undue hardship . . . obtain the substantial equivalent of the materials by other means." *Long v. Joyner*, 155 N.C. App. 129, 136, 574 S.E.2d 171, 176 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 26(b) (3)). Pursuant to the rules of discovery, N.C. Gen. Stat. § 1A-1, Rule 26(b) (3), "documents prepared in anticipation of litigation are afforded a qualified immunity from discovery by the party seeking those documents." *Cook v. Wake County Hospital System*, 125 N.C. App. 618, 623, 482 S.E.2d 546, 550 (1997) (holding that an accident report prepared by a hospital regarding a doctor's slip and fall did not constitute work product).

Defendants first contend that the trial court erred by requiring Howell to identify the documents he reviewed with his attorney to prepare for his deposition, because the information was protected by attorney-client privilege and the doctrine of work- product.

N.C. Gen. Stat. § 8C-1, Rule 612(b) (2007),

regulates the disclosure of such non-privileged documents to an adverse party:

> If, before testifying, a witness uses a writing or object to refresh his memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have those portions of any writing or of the object which relate to the testimony produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.

Notably, the rule explicitly includes "deposition" testimony. Moreover, the official Commentary of Rule 612 state that "[i]f the writing is used before testifying for the purpose of testifying, disclosure is in the discretion of the court." Rule 612(c) addresses the proper procedure when the writing allegedly contains privileged material:

> If it is claimed that the writing or object contains privileged information or information not directly related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any such portions, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal.

> If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if justice so requires, declaring a mistrial.

At the hearing on the motions to compel discovery, the attorney for the Plaintiff explained, "I don't want to know documents . . . [the Defendants' attorney] prepared" for his client." Rather, the attorney for Plaintiff requested discovery of nonprivileged documents Howell reviewed in preparation for his deposition, documents such as the "police report[,]" "anybody's deposition[,]" or "anybody's statements[.]" The attorney for Defendants argued, "I don't think [P]laintiff's lawyer gets to learn what Mr. Howell and I looked at together," to which the court replied, "I'm not asking you to do that. I'm asking him to respond to the question as to what documents [which were not protected by attorney-client privilege or the doctrine of work product] [did Howell review] in preparation of the deposition."

Defendants admit in their brief to this Court that "the documents themselves may not individually be privileged[,]" but posit that the communications between Howell and his attorneys are privileged. However, the trial court did not compel discovery of the communications between Howell and

his attorneys, but rather, the non-privileged documents that Howell reviewed.

Furthermore, Defendants, the party asserting the protection, failed to meet their burden of showing that the documents were protected by the doctrine of work product or attorney-client privilege. *See Isom*, 177 N.C. App. at 410, 628 S.E.2d at 461; *In re Miller*, 357 N.C. at 336, 584 S.E.2d at 786. In fact, Defendants failed to explicitly state what documents they argue are protected. Because Defendants generally argue that the documents reviewed by Howell are either protected by the attorney-client privilege or the doctrine of work product, without submitting the allegedly privileged documents to either the trial court, *in camera*, or to this Court, offering a specific explanation as to why the documents are protected, we conclude that the trial court did not abuse its discretion in compelling, in accordance with N.C. Gen. Stat. § 8C-1, Rule 612, the discovery of non-privileged documents Howell reviewed in anticipation of his deposition. This assignment of error is overruled.

Defendants next contend that the trial court erred by requiring PFS to produce its internal investigation/accident report, generated by Howell and Lawrimore, because the document was protected by attorney-client privilege and the doctrine of work-product.

"In general, documents created in anticipation of litigation are considered 'work product,' or 'trial preparation' materials, and are protected because

'[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.'" *Cook*, 125 N.C. App. at 623, 482 S.E.2d at 550 (quoting *Willis v. Duke Power*, 291 N.C. 19, 35, 229 S.E.2d 191, 201 (1976)). However, "[m]aterials prepared in the ordinary course of business are not protected," and are thus, not considered materials "prepared under circumstances in which a reasonable person might anticipate a possibility of litigation." *Willis*, 291 N.C. at 35, 229 S.E.2d at 201. Documents prepared " " 'in anticipation of litigation' include 'not only materials prepared after the other party has secured an attorney, but those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation.' " *Diggs v. Novant Health, Inc.*, 177 N.C. App. 290, 310, 628 S.E.2d 851, 864 (2006) (quoting *Willis*, 291 N.C. at 35, 229 S.E.2d at 201).

Willis, 291 N.C. at 35, 229 S.E.2d at 201, and *Cook*, 125 N.C. App. at 623-24, 482 S.E.2d at 550, cite 8 Wright, Miller and Marcus, *Federal Practice and Procedure: Civil*, § 2024 at 343 (1994), offering the following guidance:

> Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the

> prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of the litigation.

Id. In *Cook*, this Court stated the following with regard to a hospital accident report: In short, the accident report would have been compiled, pursuant to the hospital's policy, regardless of whether Cook intimated a desire to sue the hospital or whether litigation was ever anticipated by the hospital." 125 N.C. App. at 625, 482 S.E.2d at 551-52.

Here, the facts tend to show that the attorney, Ullrich, did not contact Lawrimore and Howell until they had already begun the accident report, and the procedural manual directs that the preparation of the accident report was for safety purposes, not for the purpose of seeking legal advice, as required for the attachment of attorney-client privilege. Moreover, the accident report was created in the ordinary course of the business of Pilgrim's Pride, pursuant to their safety manual, which negates the possibility of the protection of the report under the doctrine of work product.

With regard to the accident report in question Lawrimore stated the following in his deposition:

> Q: . . .[Y]ou collected information regarding

this accident and you talked to Mr. Howell based upon your normal practice as safety director of the . . . facility.

A: Yes, sir. .

A: We were doing an accident report; trying to get his statement.

Q: . . . An accident report, what is that?

A: Okay. It tells the vehicles involved. Now, this is something we do on our own. Tells the vehicles involved; who the drivers were; what they - their reason for the accident. I go through, you know, put. all their drivers license information; get all that together.

Q: And you do this every time there is an accident?

A: I do this every time there is a DOT recordable accident.

Q: And that's something you do as safety director for all accidents, DOT recordable accidents, involving your drivers.

A: Oh, yes.

Q: And you do that as a normal course

of business as part of PFS?

A: Yes, sir.

Q: And you do that - and that's actually part of your policies and procedures at PFS to do that?

A: Yes, sir.

Q: And on this accident report that you called that is [an] official document for PFS?

A: Yes, sir.

Q: It's a business document.

A: Yes, sir.

Q: And that document is generated by you in the normal course of business whenever there is an accident?

A: Yes, sir.

Q: Did you get Mr. Howell to fill out this accident report?

A: Yes, sir.

Q: So, before you got the call, you [were] already starting a process of filling out this accident report?

A: Yes, sir.

Q: And regardless of the call you would have still completed that accident report?

A: Yes, sir.

We further note that Pilgrim's Pride Corporation's Statement of Safety Policy contained the following "accident-control program":

> All accidents involving a Company vehicle will be reviewed by the Accident Review Board. Responsibilities of the Accident Review Board will be as follows:
>
> 13.1 Identify the cause or causes of the accident. . . .
>
> 13.4 Make recommendations for corrective action to prevent reoccurrence of similar accidents in the future. . . .
>
> 16.13 Completely and accurately fill out the Company Accident Report at the accident scene. An accident package should be in the glove compartment of each tractor. If not, contact your supervisor.
>
> 16.14 Accident Report Forms must be

> completed and submitted to the Corporate Fleet Safety Office within 24 hours after the accident, or no later than the next scheduled shift. . . .

Based on the foregoing evidence, we cannot say that the trial court abused its discretion in concluding that the accident report was not work product, nor was it protected by attorney client privilege. The report was "prepared in the ordinary course of business[.]" *Willis,* 291 N.C. at 35, 229 S.E.2d at 201. As in *Cook,* the accident report here "would have been compiled, pursuant to the [company] policy, regardless of whether . . . litigation was ever anticipated[.]" *Cook,* 125 N.C. App. at 625, 482 S.E.2d at 551- 52. We conclude the trial court did not abuse its discretion in compelling the discovery of the accident report.

We conclude the trial court did not abuse its discretion in issuing the orders compelling the discovery of Howell's social security number, the non-privileged documents Howell reviewed in preparation for his deposition, and the accident report.

Affirmed.

Judges MCCULLOUGH and ELMORE concur.

APPENDIX D

No. 526P07-2 *EIGHT-B DISTRICT*

SUPREME COURT OF NORTH CAROLINA

****

(Fulmore v Howell, et al)

MARY E. FULMORE, ADMINISTRATOR OF THE ESTATE OF PRISCILLA ANN MAULTSBY,

Plaintiff,

v.

GREGORY HOWELL and PFS DISTRIBUTION COMPANY, INC.,

Defendants/Third-Party Plaintiff,

v.

INA LOFTIN HARPER,

Third-Party Defendant.

From NC Court of Appeals
(07-984)
From Wayne
(06CVS23)

****

ORDER

Upon consideration of the petition filed on the 4th day of April 2008 by Defendants (Howell and PFS Distribution) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 26th day of August 2008.

s/ Hudson J.

For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of August 2008.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

/s/_____
Shaula A. Brannan
Assistant Clerk [SEAL]

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)

Mr. Charles F. Hilton, Attorney at Law, For Howell & PFS Distribution Co. (by E-Mail)

Mr. Thomas E. Ullrich, Attorney at Law, for Howell & PFS Distribution Co.

Mr. Paul A. Daniels, Attorney at Law, For Howell & PFS Distribution Co. (by E-Mail)

Ms. Joretta Durant, Attorney at Law, For Fulmore

Mr. Shean Williams, Attorney at Law, For Fulmore

Mr. Hezakiah Sistrunk, Jr., Attorney at Law, for Fulmore Mr. Stuart L. Stroud, Attorney at Law, For Harper

West Publishing Company (By E-mail)

Lexis-Nexis (By E-mail)

LOIS Law (By E-mail)

APPENDIX E

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAYNE COUNTY, NORTH CAROLINA
FILE NO. 2006CVS23

Mary E. Fulmore, Administrator
of the Estate of Priscilla Ann Maultsby,

Plaintiff,

v.

Gregory A. Howell and
PFS Distribution Company, Inc.,

Defendants/Third-Party Plaintiff,

v.

Ina Loftin Harper,

Third-Party Defendant.

TRANSCRIPT

Transcript of motions hearing, taken in the General Court of Justice, Superior Court Division, Wayne County, Goldsboro, North Carolina, on March 14, 2007, Criminal/Civil Session, before the Honorable Thomas D. Haigwood, Judge Presiding.

APPEARANCES:

MR. SHEAN D. WILLIAMS
Cochran, Cherry, Givens, Smith & Sistrunk P.C.
Attorneys at Law
127 Peachtree Street, N.W., Suite 800
Atlanta, Georgia 30303
on behalf of the Plaintiff

MS. JORETTA DURANT
207 South Queen Street
Kinston, North Carolina 28501
on behalf of the Plaintiff

MR. CHARLES F. HILTON
MR. THOMAS E. ULLRICH
Wharton Aldhizer & Weaver PLC
Attorneys at Law
100 South Mason Street
Harrisonburg, Virginia 22801
on behalf of the Defendant

MR. PAUL A. DANIELS
Greensboro, North Carolina
on behalf of the Defendant

MR. STUART L. STROUD
Wallace, Morris, Barwick, Landis & Stroud, P.A.
Attorneys at Law
131 South Queen Street
Kinston, North Carolina 28502
On Behalf of the Third-Party Defendant

KARLA GRANT, RMR
OFFICIAL COURT REPORTER
3291 ALTON PHILLIPS ROAD
KINSTON, NC 28504-8614
Office: (919)731-7994

than this litigation. It's not to be released to any third parties other than those directly involved in this litigation or its investigation.

MR. HILTON: Yes, sir.

THE COURT: All right. What's your next problem, Mr. Williams?

MR. WILLIAMS: The last question that Mr. Howell – there was two questions. You addressed them both at the same time.

MS. DURANT: Social Security.

MR. WILLIAMS: So Social Security number and the drivers license, they're instructed to respond to; is that correct?

THE COURT: I haven't spoken about the Social Security Number.

MR. WILLIAMS: Okay. I'm sorry. I apologize.

THE COURT: Tell me about that. Why is it that you have a need for that?

MR. WILLIAMS: For the same reason that PFS did, I want to go back and use that information to obtain driving and

professional history on Mr. Howell, as well as any criminal history that might also be relevant. What typically happens in trucking accidents, or trucking cases, is that these companies use the same people I would use to make

sure Mr. Howell doesn't have an alias, doesn't have an additional drivers license out there, that he might not be in compliance. I also want to use that information, if I find out he had any prior tickets or accident, I can send a direct request to the entity as relates to the ticket, and I need something to identify Mr. Howell by. If I don't have a drivers license number or a Social Security number –

THE COURT: You've got a drivers license number now. Help me about the Social Security number. How does – I just – I'm not familiar with how that has anything to do with ...

MR. WILLIAMS: The process – the same information that you – the same method that we use, as relates to drivers license, we take that Social Security information and we put in databases to try to find out if there are any additional criminal driving or professional history that might not be connected to the drivers license information. That's the same thing that PFS did when they hired Mr. Howell. It wasn't privileged to them at that time. Mr. Howell put his professional history into question when he drove a tractor-trailer. It's an issue in this case –

THE COURT: I'm not – I'm not – I don't disagree with that conclusion.

MR. WILLIAMS: Okay.

89

THE COURT: I'm just trying to figure out how the Social Security number itself – I mean if there are records that you ...

MR. WILLIAMS: Well, one of the issues, your Honor, is under the federal regs you're not allowed to have multiple drivers licenses; you're not allowed to have certain – it relates to their own policies – you're only allowed to have a certain number of accidents or a number of violations. Sometimes that information can't just be obtained just based on the drivers license information, so the Social Security information is something that's also used in databases to find out as much information regarding a person's driving and professional history, similar to a drivers license. If you have multiple drivers licenses we wouldn't know without a Social Security number.

THE COURT: I didn't know that – I didn't know the drivers license divisions maintained or indexed drivers' histories by Social Security numbers.

MR. WILLIAMS: All that – all that information is – not only the social, but your drivers license information, are contained on that database. Also this is not just motor vehicle departments I'm talking about; their database is shared by prior employers, prior ah, court systems. I'm just trying to make sure that if – and I've actually had

this occur in a case, where I filed some information that was not disclosed, even – or known to the employer of the trucker, and so that's why it's part of the normal course of my practice, I ask that question. And I, and like I – I have no problem making sure that we have a protective order in that regard, but I think it clearly would be relevant and may lead to admissible evidence in this case.

THE COURT: Okay. Thank you. Anything you want to say further, Mr. Williams? Excuse me, no, Mr. Hilton. Excuse me.

MR. HILTON: Your Honor, the Privacy Act, the Federal Privacy Act of 1974, if I may hand this up, controls here, along with North Carolina General Statute 132-1.10. The Federal Privacy Act says: It shall be unlawful for any federal, state or local government agency to deny any individual any right, benefit or privilege provided by law because of such individual's refusal to disclose his Social Security account number, creating a privacy interest in the Social Security number.

The same is true, your Honor, of North Carolina General Statute 132-1.10, which is: Except as provided in subsections (c) and (d), no agency of the State or its political subdivisions, or any agent or employee of a government agency shall do any of the following: collect a

Social Security number from an individual unless authorized by law to do so.

Now, one of the exceptions is, if this Court orders, and I do understand that. Now I'm – I would submit that in this instance the Federal Privacy Act preempts North Carolina law in this regard.

THE COURT: All right.

MR. HILTON: So, your Honor, again, not – it's just something that's not needed to be out there, with everything that's going on today in terms of identity theft.

THE COURT: All right. Well, I'm going to order that you provide it with the same – and the same limitations as to its use.

MR. HILTON: Yes, sir.

THE COURT: All right. Anything further for the plaintiff?

MR. WILLIAMS: Yes, your Honor. The last question that he instructed not to answer is I asked Mr. Howell, as I commonly do in depositions, please let me know what documents you have reviewed to prepare for today's deposition. An objection was made by Mr. Hilton regarding that as a work product, an attorney-client communication. I then limited the scope of my question and said: What nonprivileged documents did you review in preparation of